(3)

Supreme Court, U.S.
FILED
JUN 13 1997
OFFICE OF THE CLERK

No. 96-1752

In The

Supreme Court of the United States

October Term, 1996

NEW PORT LARGO, INC.,

Petitioner,

v.

MONROE COUNTY,

Respondent.

On A Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITIONER'S REPLY BRIEF

ARAGON, BURLINGTON, WEIL & CROCKETT, P.A.
JEFFREY B. CROCKETT, Esq.*
Office in the Grove, Penthouse
2699 South Bayshore Drive
Miami, Florida 33133
Telephone: (305) 858-2900

and

MICHAEL R. SEWARD, Esq.
9200 South Dadeland Boulevard
Suite 700
Miami, Florida 33156
Telephone: (305) 670-6000

**Counsel of Record*

June 13, 1997

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

13 pp

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

PETITIONER'S REPLY BRIEF 1

I. RIGHT TO JURY TRIAL 2

II. TAKINGS 6

III. FULL FAITH AND CREDIT 7

CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES

Corn v. City of Lauderdale Lakes, 816 F.2d 1514 (11th Cir. 1987) 8

Dade County v. National Bulk Carriers, Inc., 450 So. 2d 213 (Fla. 1984) 8

Del Monte Dunes at Monterey, Ltd. v. City of Monterey, 95 F.3d 1422 (9th Cir. 1996) 2, 3, 5

Kasser v. Dade County, 344 So. 2d 928 (Fla. 3d DCA 1977) 8

New Port Largo, Inc. v. Monroe County, 95 F.3d 1084 (11th Cir. 1996) 1, 2, 3, 5, 6

Stokes v. Jacksonville, 276 So. 2d 200 (Fla. 1st DCA 1973) 9

Suitum v. Tahoe Regional Planning Agency, ___ U.S. ___, 1997 WL 273658 4

PETITIONER'S REPLY BRIEF

The Brief for Respondent, Monroe County, filed in opposition to New Port Largo's Petition for a Writ of Certiorari, underlines the appropriateness of this Court's exercise of its discretion to hear this case, *New Port Largo, Inc. v. Monroe County,* ("NPL II"), 95 F.3d 1084 (11th Cir. 1996) (App. A). Nowhere in Respondent's Brief does the County deny or minimize the importance of the issues raised by this case. Given the limited purpose of a reply brief under this Court's rules, Petitioner will only address the new issues raised by Respondent County in its Brief.

In its factual presentation, Respondent County once again presents a version of facts which a state court rejected in the County's lawsuit seeking to acquire title to the property in question. App. 1. The state court in this litigation found that the County zoned the property for residential use at the request of the owner (App. I-4 ¶ 17) because of the County's abandonment of the airport plan for lack of funding (App. I-3 ¶¶ 11-13), not because there was "no zoning classification applicable to airports." Respondent's Brief at 1. The owner did not construct a "runway" on the property, Respondent's Brief at 3, he constructed a "street" for future residents. App. I-3 ¶ 14. The original owner, contrary to Respondent's Brief at 1-2, denied that he ever requested a zoning change to allow for airport use (years before NPL's purchase of the property), but the relevance of this proposed change in zoning (filed by the airport lessee) is surely that the County *denied* the request, further documenting in the public records relied upon by Petitioner that the intended permanent use of the property was for residences and not for airport use.

Respondent County attempts to suggest that a paper transfer of title to the property in question from a corporation owned equally by its two principals to a corporation owned by one principal and a trust for the benefit of the other (essentially as part of a business divorce between the principals) (see App. D-6 to D-7)[1] could have had some effect on NPL's zoning challenge. Aside from the fact that the transfers were both legally and factually irrelevant to any issue in that case, and were disclosed of record to the County, Florida law expressly provided, Rule 1.260(c), Fla. R. Civ. P., that after a transfer of interest any action may nonetheless proceed in the name of the original party. Thus, there is no issue of misrepresentation or concealment presented by this record.

I. RIGHT TO JURY TRIAL

Regarding the jury trial issue, Respondent makes various arguments, which are mutually inconsistent. Respondent first attempts to argue that there is no conflict between the Ninth Circuit holding in *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 95 F.3d 1422 (9th Cir. 1996) and the Eleventh Circuit opinion for which review is sought in *NPL II*. In making this argument, the County ignores the Ninth Circuit's unambiguous ruling that the inverse condemnation plaintiff, "Del Monte was entitled to have a jury try its inverse condemnation

---

[1] The Eleventh Circuit expressly declined to address this issue. App. A-13 at n.7.

claim." *Del Monte Dunes, supra,* 95 F.3d at 1427. In direct conflict, the Eleventh Circuit stated below:

> contrary to NPL's contention . . . no jury fact-finding is required in regulatory takings cases. [Citation to *Highland Beach* omitted] We agree with the district judge's determination that no jury had to be empaneled for the regulatory takings claim.

NPL II at 1092; App. A-16 to A-17.

A district judge under *Del Monte Dunes* might have discretion over whether to (1) decide as a legal matter if certain facts found by a jury (e.g., economically viable use, effect on investment backed expectation) amounted to a taking, or to (2) instead submit the ultimate "taking" issue itself to the jury. There is no "discretion", however, under *Del Monte Dunes,* to simply forego a jury which at least one party has demanded and try disputed factual issues to the court. It is only the Eleventh Circuit in the *New Port Largo* case which has rejected, in principle and absolutely, the right to jury trial itself on liability issues in inverse condemnation cases. This rejection is completely inconsistent with not only *Del Monte Dunes* but the many cases of this Court cited in Petitioner's Petition for Writ of Certiorari, the constitutional analysis of which is not addressed by Respondent.

Equally untenable is the County's attempt to sidestep the jury trial issue by claiming that what really happened below was a summary judgment, and not a trial at all. Effectively repudiating the Eleventh Circuit's stated basis for its holding, the Respondent County contends that the trial court only ruled on issues of law. Respondent's Brief

at 13-15. Thus the County makes the remarkable argument that the trial court's ruling on all issues in the case following an eight day trial with live witnesses was "little different than a judge holding a hearing on a motion to dismiss for failure to state a claim or ruling on a motion for summary judgment", Respondent's Brief at 15.[2] While some takings cases no doubt are determinable under Rule 56, *e.g., Suitum v. Tahoe Regional Planning Agency*, ___U.S.___, 1997 WL 273658, 8-9 & n.13 (takings case raises issues of fact which may or may not be resolvable on motion for summary judgment), the district court and the Eleventh Circuit did not address the issues in the instant case as a matter of law.

The district court ruled for Respondent County – after denying its motions for summary judgment because of disputed factual issues (App. D-12 to D-14) – based on its resolution of a number of *factual* issues, determined by judgments of witness credibility: for example, the value of the property under two different zoning scenarios, the profitability of a potential airport operation, and the supposed "profit" to NPL from a related party paper transaction (App. B-20 to B-25). The Eleventh Circuit followed along this same trail by explicitly reviewing the district court's decision under the "clearly erroneous" standard of review. App. A-9. Indeed, to eliminate any doubt on the point, the Eleventh Circuit characterized Petitioner's arguments on the merits as "essentially" quarrels with

---

[2] In Respondent's Taking Clause argument, contrary to Respondent's position on the Jury Trial issue, Respondent once again relies on the factual findings and credibility determinations of the district court. Respondent's Brief at 17-18.

the district court's fact-finding i.e., his "decision to credit the testimony of Defendant's expert." (App. A-9) The plain holding of the Eleventh Circuit in *NPL II* was not that there were no factual issues, but that the district court, rather than the jury, was the appropriate party to resolve them.

Given Respondent County's attempt to erase the Ninth Circuit's opposing viewpoint in *Del Monte Dunes* and to transform the trial court's fact-finding in the present case into a summary judgment, it is perhaps not surprising that the County would distort the position of Petitioner on the jury trial issue at hearing where the County brought up (without benefit of briefing) its request to have the district court as finder of fact. The out of context sentence quoted by Respondent, Respondent's Brief at 8-9, was part of Petitioner's argument that in the circumstances of this case, Petitioner was entitled to a judgment of liability as a matter of law on the taking question, leaving only issues of damages for the jury. A party does not waive its demand for jury by claiming that it is entitled to prevail as a matter of law, contrary to the unique and unprecedented argument made by Respondent County, Brief at 15-16. In its selective account of that hearing, Respondent County fails to tell this Court that Petitioner's counsel noted that "the plaintiff would not waive any right to determination of factual issues by the jury that would then be provided to the Court for its legal analysis." R31-13. Indeed, NPL's attorneys strenuously argued that all fact issues, such as the value of the property under alternative zoning arrangements, should be submitted to a jury, notwithstanding that the ultimate decision as to liability, based upon the jury's factual

findings, might be a question of law for the court. Within days of the district court's oral ruling, contrary to NPL's argument, that all issues of liability would be resolved by the court, Petitioner filed an emergency Petition for Writ of Mandamus to the Eleventh Circuit, seeking to have a jury empaneled in the case to decide the factual issues relating to liability. Case No. 94-5031 (petition for writ of mandamus denied without opinion).

Given this procedural history, it is not surprising that nothing in the decisions of either the district court of the Eleventh Circuit remotely suggested a finding of waiver. Clearly, Respondent County's attempt to defeat review based on an argument of waiver is spurious. The erroneous holding of the Eleventh Circuit on the fundamental issue of the right to trial by jury remains a compelling reason for this Court to grant the Petition for Writ of Certiorari.

II. TAKINGS

Under the Eleventh Circuit decision in *NPL II*, a County may transform, without compensation, privately-owned residential property into an airport for satisfaction of an alleged need by the public for such an airport. (Respondent acknowledges, Brief at 3, that the airport it wanted to retain was a "public airport.") This is not an application of this Court's precedents but a fundamental rejection of their principles. That Respondent can defend this position highlights dramatically the apparent need for this Court to address the type of conduct that will be a taking under the Fifth Amendment.

III. FULL FAITH AND CREDIT

Rather than address the manifest importance of Full Faith and Credit principles in land use analysis, or the fundamentals of federalism upon which the full faith and credit statute is based, Respondent County takes the astonishing position that the issue of confiscation without compensation was not raised in state court, or was irrelevant to the invalidation of the zoning by the Florida courts. Respondent's Brief at 5, 22-25. These contentions are overwhelmed by the record.

The issue of takings (*not* as a claim for damages, as the Eleventh Circuit mistakenly assumed, but as a basis for invalidation of the airport zoning as confiscatory) was squarely raised in the pleadings in New Port Largo's state law zoning challenge. The governing Amended and Supplemental Complaint (PX-1-62) alleged:

> 15. Defendant, MONROE COUNTY, . . . has embarked upon a course of action to *deprive the Plaintiff of the subject property without offering compensation* therefor, all in violation of the Constitutions and laws of the United States and of the State of Florida.
>
> * * *
>
> 18. To allow the subject property to be zoned airport *would deprive Plaintiff of its property without compensation* for the purpose of providing Upper Monroe County with a public airport without compensation.

On December 12, 1985, the state court held a hearing on NPL's motion for summary judgment. PX-1-58. At the conclusion of the hearing, the Honorable Ignatius Lester decided to continue the hearing and he requested the

parties to submit briefs "to assist me in making the decision." PX-1-58-21. NPL submitted its brief on December 19, 1985. PX-1-62. The brief identified one of the "Questions Presented" as follows: *"Whether the rezoning is an unlawful course of action followed by the County which deprives the landowner of his property without just compensation . . . U.S. Const. Amend. V."* PX-1-62-i. Under Florida law, if a zoning ordinance denied an owner "any reasonable use" of his property, it amounted to a confiscatory taking and the zoning ordinance would be invalidated in a circuit court certiorari proceeding. *Kasser v. Dade County,* 344 So. 2d 928 (Fla. 3d DCA 1977); *Corn v. City of Lauderdale Lakes,* 816 F.2d 1514, 1517-19 (11th Cir. 1987); *Dade County v. National Bulk Carriers, Inc.,* 450 So. 2d 213, 216 (Fla. 1984). This was precisely what was argued by NPL in its brief:

> [T]he rezoning is *confiscatory* in a constitutional sense because it deprives the landowner of his property without just compensation therefor. . . . Clearly, this sort of confiscatory behavior will violate several statutes and constitutional provisions. . . .
>
> * * *
>
> . . . Additionally, *the rezoning violates both the Federal constitution and the Florida state constitution: " . . . nor shall private property be taken for public use without just compensation." U.S. Const. Amend. V.* . . . The rezoning was tantamount to an acquisition of property without compensation, thereby violating the landowner's individual constitutional property rights. A zoning regulation will not be upheld where it constitutes an unconstitutional violation of property

> right. *Stokes v. Jacksonville*, 276 So. 2d 200 (Fla. 1st DCA 1973).

PX-1-62-14, 18.

After reviewing NPL's brief, Judge Lester conducted a *second* hearing, at which HPL's counsel "argued for invalidation . . . based on the arguments made in the NPL brief." R14-259. After reviewing the evidence, authorities, and arguments of counsel, Judge Lester entered a Final Summary Judgment on January 2, 1986, which was never appealed, ruling in favor of NPL and invalidating the zoning. Specifically, the state court held:

> The only permitted used in said zoning district is a private airport;
>
> * * *
>
> The subject property does not qualify by dimensions to meet the requirements as a public airport or a private airport; and
>
> * * *
>
> This rezoning of this property, now determined to be private, to airport, would deprive the owner of any reasonable use.
>
> * * *
>
> Therefore, it is Ordered and Adjudged as follows: . . . The attempted rezoning of the subject property to Private Airport is invalid and Resolution No. 234-1980 is hereby quashed. . . .

PX-1-63-2 (App. H). These state court holdings were not dictum, or some irrelevant frolic the federal courts were

free to disregard.[3] Thus, contrary to Respondent's misstatements, this case does indeed present a sound record for the Court's review of questions critical to the application of cooperative federalism in land use jurisprudence.

CONCLUSION

WHEREFORE, Petitioner prays that its Petition for Writ of Certiorari be granted.

Respectfully submitted,

JEFFREY B. CROCKETT, ESQ.*
ARAGON, BURLINGTON, WEIL
& CROCKETT, P.A.
2699 South Bayshore Drive
Penthouse
Miami, Florida 33133
Telephone: (305) 858-2900

and

MICHAEL R. SEWARD, ESQ.
LAW OFFICES OF MICHAEL SEWARD
9200 South Dadeland Boulevard
Suite 700
Miami, Florida, 33156
Telephone: (305) 670-6000

**Counsel of Record*

Dated: June 13, 1997
Miami, Florida

---

[3] Respondent also acknowledges in its Takings argument what is obvious, that the district court and Eleventh Circuit analyses of the Taking issue were dependent on the district court's finding that "many profitable uses" other than airport were possible. Respondent's Brief at 20.